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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/552,969	10/13/2005	Anton Arnold Van Der Heiden	1458-003	1664
32905 7590 09/08/2009 JONDLE & ASSOCIATES P.C. 858 HAPPY CANYON ROAD SUITE 230 CASTLE ROCK, CO 80108				
EXAMINER				
BUL PHUONG T				
ART UNIT		PAPER NUMBER		
1638				
MAIL DATE		DELIVERY MODE		
09/08/2009		PAPER		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

### Office Action Summary

**Application No.**

10/552,969

**Applicant(s)**VAN DER HEIDEN, ANTON  
ARNOLD**Examiner**

Phuong T. Bui

**Art Unit**

1638

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 05 March 2009 and 26 June 2009.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 12-21, 23-26, 29 and 31 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 12-21, 23-26, 29 and 31 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |  |
|--|--|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                       | 5) <input type="checkbox"/> Notice of Informal Patent Application                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____   |

**DETAILED ACTION**

1. The Office acknowledges the receipt of Applicant's amendment filed March 5, 2009 and formal drawings filed June 26, 2009. Claims 12-21, 23-26, 29 and 31 are pending and are examined in the instant application.

All previous rejections not set forth below have been withdrawn. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action. This action is made FINAL.

***Claim Rejections - 35 USC § 112, second paragraph***

2. Claims 13-17 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 13 does not further limit claim 12.

Clarification and/or correction are required.

***Claim Rejections - 35 USC § 102***

3. Claims 12-21, 23-26, 29 and 31 are rejected under 35 U.S.C. 102(b) as being anticipated by Smith, PG (J. Hered., Vol. 41, No. 5, pp. 138-140) in light of Shiffriss et al. (Euphytica, Vol. 60, 1992, pp. 123-126), Park et al. (Korean Journal of Plant Pathology, Vol. 5, Nol. 3, 1989, pp. 262-270) and Osuna-Garcia et al. (Journal of Agricultural and Food Chemistry, Vol. 46, Nol. 12, Dec 1998, pp. 5093-5096). This rejection is maintained for reasons of record.

Applicant traverses primarily that anticipation requires the disclosure in a single reference, none of the cited references teach a method to enhance sucrose or ascorbic

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acid content, a mature green chile pepper of Osuna-Garcia has significantly lower ascorbic acid content than any of the red chile peppers, and the starting materials of Applicant are not identical to Smith and therefore the sucrose or ascorbic acid levels are not identical.

Applicant's traversals have been carefully considered but are deemed unpersuasive for the following reasons. The "in light of" in the rejection is used to show inherency of properties of the fruit of Smith. Smith singly anticipates the claimed invention. Additionally, the claims are drawn to a method and not a product. The method only requires "manipulating the CL and the Y loci such that said CL and Y loci comprise two recessive *y* alleles and two recessive *cl* alleles". According to claim 1, the "manipulating" alone will result in enhanced sucrose and/or ascorbic content. Thus Applicant's traversals are not commensurate in scope with the claims. No additional steps are required. The starting material is not specified. If a different starting material or additional steps are required to achieve the recited sucrose and ascorbic acid levels, then they should be included in the claims. Osuna-Garcia was relied on to show peppers increase in ascorbic acid content as they ripen. Smith is the anticipatory reference. As indicated in the previous Office action, Smith teaches genetic crosses to obtain a plant having two recessive *y* alleles and two recessive *cl* alleles. If the Permagreen fruit of Smith (in light of Shifriss) does not have the same sucrose and ascorbic acid levels as the claimed invention, it is suggested the claims recite a different starting material.

4. Claims 12-21, 23-26, 29 and 31 are rejected under 35 U.S.C. 102(b) as being anticipated by Shifriss et al. (Euphytica, Vol. 60, 1992, pp. 123-126) in light of Park et al. (Korean Journal of Plant Pathology, Vol. 5, Nol. 3, 1989, pp. 262-270) and Osuna-Garcia et al. (Journal of Agricultural and Food Chemistry, Vol. 46, Nol. 12, Dec 1998, pp. 5093-5096). This rejection is maintained for reasons of record.

Applicant traverses primarily that anticipation requires the disclosure in a single reference, none of the cited references teaches a method to enhance sucrose or ascorbic acid content, a mature green chile pepper of Osuna-Garcia has significantly lower ascorbic acid content than any of the red chile peppers, Park indicates red pepper fruits have higher total carbohydrate content than green pepper fruits, and the starting materials of Applicant are not identical to Shifriss and therefore the sucrose or ascorbic acid levels are not identical.

Applicant's traversals have been carefully considered but are deemed unpersuasive for the following reasons. The "in light of" in the rejection is used to show inherency of properties of the fruit of Shifriss. Shifriss singly anticipates the claimed invention. Additionally, the claims are drawn to a method and not a product. The method only requires "manipulating the CL and the Y loci such that said CL and Y loci comprise two recessive *y* alleles and two recessive *cl* alleles". According to claim 1, the "manipulating" alone will result in enhanced sucrose and/or ascorbic content. Thus Applicant's traversals are not commensurate in scope with the claims. No additional steps are required. The starting material is not specified. If a different starting material or additional steps are required to achieve the recited sucrose and ascorbic acid levels,

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then they should be included in the claims. Osuna-Garcia was relied on to show peppers increase in ascorbic acid content as they ripen. Park was relied on to show peppers increase in sugar content as they ripen. Shifriss is the anticipatory reference. As indicated in the previous Office action, Shifriss teaches genetic crosses to obtain a plant having two recessive *y* alleles and two recessive *cl* alleles. If the Permagreeen or P-G fruit of Shifriss does not have the same sucrose and ascorbic acid levels as the claimed invention, it is suggested the claims recite a different starting material.

### ***Remarks***

5. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

6. No claim is allowed.

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7. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Phuong T. Bui whose telephone number is 571-272-0793.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Anne Marie Grunberg can be reached on 571-272-0975. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/Phuong T. Bui/  
Primary Examiner  
Art Unit 1638  
9/6/09